Supreme Court, U.S.
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No.

In the

# Supreme Court of the United States

DANNY HENSLEY, STEVE WINSLOW and VIRGINIA FLIPPIN, on BEHALF of the ESTATE of LUCIAN DOYLE FLIPPIN,
*Petitioners*,

*v.*

HOME DEPOT U.S.A., INC.,
*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

I. DOES THE MCDONNELL DOUGLAS BURDEN SHIFTING ANALYSIS AUTOMATICALLY APPLY TO ALL ADEA CLAIMS?

II. DID THE MAGISTRATE/DISTRICT COURT ENGAGE IN SUBSTANTIAL EVIDENCE WEIGHING AND FAIL TO APPLY THE STANDARDS SET FORTH BY THIS COURT IN *REEVES V. SANDERSON PLUMBING PRODUCTS, INC.* WITH RESPECT TO EVIDENCE OF AGE DISCRIMINATION?

III. DID THE MAGISTRATE/DISTRICT JUDGE MISAPPLY THE LAW BY FAILING TO CONSIDER EVIDENCE OF DIFFERENT TREATMENT OF SIMILARLY SITUATED EMPLOYEES DURING THE *PRIMA FACIE* CASE?

IV. DID THE MAGISTRATE/DISTRICT JUDGE FAIL TO APPLY THE STANDARDS SET FORTH IN *REEVES V. SANDERSON PLUMBING PRODUCTS, INC.* ADDRESSING AGE RELATED COMMENTS AS EVIDENCE OF DISCRIMINATION?

V. DID THE MAGISTRATE ENGAGE IN SUBSTANTIAL EVIDENCE WEIGHING AND FAIL TO APPLY THE CORRECT LEGAL STANDARD WITH RESPECT TO THE DOCTRINE OF CONSTRUCTIVE DISCHARGE?

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The Judgment of the United States District Court for the Northern District of Texas in *Danny Hensley, et al., v. Home Depot USA, Inc.*, is unreported and set forth in the Appendix attached hereto (App. 4a ).

The Order of the United States District Court for the Northern District of Texas in *Danny Hensley, et al., v. Home Depot USA, Inc.*, is unreported and set forth in the Appendix attached hereto (App. 5a ).

The Report and Recommendation of United States Magistrate Judge in *Danny Hensley, et al., v. Home Depot USA, Inc.*, is set forth in the Appendix attached hereto (App. 6a).

## BASIS FOR JURISDICTION

The final judgment of the United States Court of Appeals for the Fifth Circuit affirming the decision of the District Court for the Northern District of Texas was entered on October 26, 2001. This petition for writ of certiorari is filed within ninety (90) days from that date. 28 U.S.C. Section 2101(c).

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Section 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Age Discrimination in Employment Act
29 U.S.C. Section 623

(a) Employer practices. It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status an as employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this Act.

## STATEMENT OF THE CASE

The three Plaintiffs were all employed by Home Depot as assistant managers at the time of their termination by the new district manager, Troy Rice. All three have sued for age discrimination under the Age Discrimination in Employment Act, 29 U.S.C. Section 623 ("ADEA").

Troy Rice became the Home Depot district manager for the district in which the Plaintiffs worked in August 1996. At that time, he was 33 years old. Mr. Winslow, an assistant manager at the time, was 43 years old. Mr. Flippin, also an assistant manager at the time, was 45 years old. Mr. Hensley, also an assistant manager at the time, was 49 years old. Mr. Rice treated older employees differently than younger employees (as reflected in the facts listed below) and set out to get rid of the older employees. Mr. Flippin was fired. Mr. Winslow and Mr. Hensley were constructively discharged.

All three of the Plaintiffs testified repeatedly in their depositions about the pattern of age discrimination that became evident and that there were a number of other employees who also complained of age discrimination, including Andy Guarino, Alex Cockcroft and Steve Temple. And, while Home Depot attempts to use two managers, Terry Bright and Steve Hedlund, to demonstrate that there was no age bias because these managers were over 40, the fact is that both of these men were subsequently demoted by Troy Rice.

A. Steve Winlsow

Steve Winslow obtained a Bachelor's degree and a Master's degree in music. He accomplished twelve hours toward a Master's in Landscape Architecture at the University of Texas, Arlington during his employment with Home Depot. He received certification as a Texas Certified Nursery Professional in approximately 1988. He received a certification as a Texas Master Certified Nursery Professional in approximately 1990. He obtained a Pesticide Applicator's License in approximately 1992.

After obtaining his degrees, Mr. Winslow worked as a band director, including fifteen years as the band director at Milliken Middle School. He also started his own landscaping company and worked in a nursery in Lewisville for a number of years before going to work for Home Depot. Mr. Winslow began his employment with the Euless Home Depot in 1992 as an hourly associate in the Lawn & Garden Department and was subsequently promoted to department manager in that department. He then was asked to transfer as department manager in the Special Services Department, which position he held for approximately a year. He was then promoted to assistant store manager and transferred to work in the Hulen store under store manager Terry Bright. Mr. Winslow was then transferred to the Richland Hills store as assistant manager over the Lawn and Garden Department.

When Mr. Winslow first hired on at Home Depot, the company did a reference check on his previous employment

which indicated that he was an "excellent" employee. In Mr. Winlsow's 90 day review at Home Depot, he was evaluated as either meeting or exceeding expectations in all areas. It was noted that he "always comes to work with a smile," he "makes customers want to come back with his happiness..." and that his "professionalism is good." In his six month review, Mr. Winlsow was rated as having the strong points of "knowledge, salesmanship, and a good attitude. You can always count on Steve to work with others, to be friendly and polite to coworkers and customers." In his 1992 evaluation, Mr. Winslow was rated as "often exceeds expectations." Mr. Winslow's evaluation in 1993 was that he often "exceeds expectations." In December 1993, Mr. Winlsow received an excellent evaluation with comments including "works well with others, has gained the respect of managers as well as other employees." At the time of that evaluation, Mr. Winlsow was the Outside Garden manager. In December 1993, it was noted on Mr. Winlsow's evaluation that he has "always set an example of what a Home Depot employee should be, either as a salesperson or as a department manager....The morale in his department is among the best in the store." One of his strengths was his "team building." Mr. Winlsow received merit badges for providing excellent customer service. He received an award for "employee of the month" in July 1993. In 1995, Mr. Winlsow had an "Employee Notice" placed in his personnel file to recognize him for good job performance. Mr. Winslow also received commendation letters from customers, including one in September 1995, after he had been promoted to assistant manager.

In November 1996, Mr. Rice decided to demote Steve Winslow based upon alleged complaints by employees about abusive behavior and allegedly undermining the store manager (Terry Bright was the store manager at the time). Mr. Rice does not know which associates made these allegations (other than one named Tammy Trotter), what was said that was allegedly "berating," what was said that was allegedly "undermining" the manager, what allegedly defamatory statements were made or even what was said

that was allegedly "abusive." Mr. Rice attempts to allege that Mr. Winlsow had previously been counseled about his "behavior and attitude" but there is no record of such in Mr. Winslow's personnel file, and Mr. Rice cannot say when Mr. Winslow was allegedly "counseled," on how many occasions or even what was said to him. Mr. Rice even admits that if someone did indeed counsel Mr. Winlsow prior to his demotion, there should have been written documentation of that, yet he is not aware of any such documentation. Prior to demoting Mr. Winlsow, Mr. Rice had never spoken to him about his alleged attitude problem. With regard to the one complainant that Mr. Rice could identify (Tammy Trotter), Mr. Rice could not even describe the circumstances of her complaint.

Terry Bright was Mr. Winslow's store manager at the time of the alleged complaints and demotion. He interacted with his assistant managers on a daily basis. If action is going to be taken against an assistant manager under his supervision, he is supposed to be involved in that process. Yet Mr. Bright was never even contacted regarding the allegations made against Mr. Winlsow or the disciplinary action (demotion) that was taken. Mr. Bright never had any issues regarding Mr. Winslow not being cooperative or following advice. He never believed that Mr. Winslow was undermining his authority as a manager and no one ever told him that they believed that Mr. Winslow was undermining his authority as a manager. He never heard Mr. Winlsow "defaming" other assistant managers and never heard another assistant manager complain that Mr. Winslow defamed them. No one ever told him that Mr. Winslow had threatened to fire them (alleged "retaliation"). While the disciplinary action notice that notified Mr. Winslow of his demotion states that his past behavior and current actions destroyed his credibility, Mr. Bright states that he doesn't know of anything that would have destroyed Mr. Winslow's credibility and that he has never had any reason to doubt anything Mr. Winlsow told him.

Mr. Winslow, in fact, did not threaten any employees. He did not berate any employees or become abusive and he did not undermine Terry Bright's management.

Compare Mr. Rice's treatment of Mr. Winslow to his treatment of two younger employees, Mike Berry and Rod Schmidt. Mr. Berry was also an assistant manager that worked under Manager Terry Bright. Mr. Bright received complaints about Mr. Berry's attitude and treatment of employees under his supervision on several occasions. He discussed these complaints with Mr. Berry. There were also complaints about Mr. Berry from other assistant managers. There were people in Mr. Berry's department that left or took different positions with the company because of their feelings about Mr. Berry. Mr. Rice even received a direct complaint about Mr. Berry. In that situation, Mr. Rice went and talked to the store manager to get his input "because he's there with him and that's his store, and he observes that and we wanted to see what his thoughts were on it." Mr. Berry has been promoted.

Mr. Rice had himself seen Rod Schmidt be aggressive and overbearing and had counseled him about his behavior. He subsequently received a complaint from an employee that Mr. Schmidt had berated the employee using foul language. Mr. Rice himself investigated the situation, including talking to the store manager. Mr. Schmidt is now a co-manager at the south Fort Worth store.

When Mr. Rice demoted Mr. Winslow, he told him that they would come up with a "game plan" concerning his future with the company. Yet Mr. Rice would not return Mr. Winslow's subsequent phone calls to try to find out what his "future" with the company would entail. Mr. Winlsow had spent considerable time and effort in enhancing his knowledge of landscaping and plants for his career path at Home Depot, going so far as to enroll in a Master's program in Landscape Architecture. Mr. Rice reassigned Mr. Winslow to be an hourly associate in the plumbing department at the Carrollton store. Mr. Winslow discussed his frustration with

the Carrollton store manager, who went to try to get information for Mr. Winlsow and then told him that it was clear that there was no "game plan." Mr. Winlsow also received a significant pay decrease with the demotion with no likelihood of an increase soon.

B. Mickey Flippin

Mickey Flippin obtained a degree in Business Management from Southwest Missouri State University in 1974. He worked as an assistant manager for K-Mart for several years and was then recruited by Wal-Mart as assistant manager and then manager. He worked for Wal-Mart for approximately nine years. The Flippins subsequently bought a convenience store which they owned and operated until their youngest son was born, at which time they sold the store so that Mrs. Flippin could stay at home with their children. Mr. Flippin then applied for work at Home Depot.

Mr. Flippin was hired at Home Depot in Orlando, Florida as assistant manager. He was transferred to Tennessee, then Austin, then promoted to store manager and transferred to the Euless store in 1992. In May 1995, Mr. Flippin was demoted to Assistant Manager and transferred to the south Arlington store.

Mickey never received anything below a "3" on his overall performance ratings ("consistently meet expectations"). In his last evaluation before Troy Rice became District Manager, Mickey was given a "3" overall. There is no mention of any criticism by Mr. Hedlund related to not working his scheduled hours, not obtaining permission to alter scheduled shifts or anything related. In fact, Mr. Hedlund testified that while he was Mr. Flippin's supervisor, up through August 1996, Mr. Flippin did a good job.

Mr. Rice arrived on the scene in August 1996. Mr. Flippin was written up on September 16, 1996, September 24,

1996 and fired on October 16, 1996. While Mr. Hedlund provided the write ups to Mr. Flippin, he did so in conjunction with Troy Rice, even though that was not his normal practice.

On September 16, 1996, Mr. Flippin was written up for leaving the "safe short,"not totaling the vault count or showing the exact shortage with a reason and not contacting the store Manager or Loss Prevention Supervisor about the shortage. However, there was no cash shortage for that vault count. Furthermore, the alleged inaccurate vault count has not been produced to either Mr. Flippin in conjunction with his write-up, to the EEOC or during this lawsuit. Instead, the Defendant keeps providing a copy of the next day's vault count that was counted and signed off on by someone entirely different! Even after Mr. Rice testified that the September 9, 1996 vault count that the Defendant was relying upon and had provided to the EEOC was not the correct document, he attached it to his Affidavit in support of Home Depot's motion for summary judgment. He even stated in his Affidavit under oath that a copy of the "vault count sheet showing that Mr. Flippin signed off on it although the count was not accurate are attached to this Affidavit as Exhibit B" when in fact that is simply not true. The exhibit attached to his Affidavit is the count from the next day that was signed off on by someone other than Mr. Flippin.

Additionally, there are other vault counts by other assistant managers in approximately the same time frame during 1996 where there were shortages that were either unexplained or inadequately explained, violating company policy, yet Mr. Rice had no idea about the existence of these bad vault counts or whether anyone was reprimanded.

Mr. Flippin was written up again in September 1996 for leaving the store before it was ready for the next day's business. Mr. Flippin had closed the store that night with another assistant manager and a department manager. The store closed at 9:00 p.m. and Mr. Flippin left at 11:15 p.m.

Both assistant managers were responsible for closing duties. They each walked different departments to ensure that they were ready for business. Mr. Flippin checked off his duties on the appropriate checklist. Interestingly, the other assistant manager (who was not reprimanded) didn't even sign the checklist that he had performed his closing duties, even though he was supposed to. Neither Mr. Hedlund nor Mr. Rice know what Mr. Flippin did or what the other assistant manager did during the closing. The only way that Home Depot alleges that the store was not ready for business was that there was trash outside the building and dead trees left outside of the Lawn and Garden Department. At that time, the other assistant manager was over the Lawn & Garden Department and that department was not signed off on by Mr. Flippin as one that he was responsible for checking. Furthermore, the other assistant manager left after Mr. Flippin and, obviously, if the alleged trash and dead trees were there when Mr. Flippin left, they were also there when the other assistant manager left. Mr. Hedlund admits that it would be important to know if the alleged trash and dead trees were there when the other assistant manager left, but that he never even asked him. Mr. Hedlund also admits that he doesn't know how many trees there were, what containers they were in, where exactly they were left or even if they were left there after Mr. Flippin left the store that night! Additionally, the trash and dead trees were there when Mr. Hedlund arrived at the store the next morning, thirty minutes after the store had opened for business. He was sure that he was upset that they hadn't been cleaned up in opening the store, but nobody was counseled or reprimanded for that.

Troy Rice fired Mr. Flippin after Mr. Flippin took an extended lunch time to attend his son's baseball game. He never asked Mr. Flippin for his side of the story before he was fired. Mr. Rice says that the store manager, Steve Hedlund, had represented that he had told all the assistant managers (including Danny Hensley) that they could not alter their shift without his permission, yet he never bothered to check with the other assistant managers to see if

that was true. Mr. Hensley says that Mr. Hedlund told them that they could alter their schedules so long as someone was covering their shift. Mr. Flippin told Mr. Hedlund that Mr. Hensley was covering for him. Mr. Hedlund states that Mr. Hensley later went home sick (although he doesn't know how much later). However, it is undisputed that when Mr. Flippin left for the extended lunch, he had another assistant manger covering his shift. Additionally, Mr. Bright testified that Mike Berry, a younger assistant manager, took extra long lunches "from time to time" and was not disciplined for doing so.

Mr. Rice and Mr. Hedlund both state that the purpose of a counseling notice is to allow an employee to fix a problem, and that once it is given it should not be held against them. Yet when Mr. Flippin was fired, Mr. Rice factored in the prior performance deficiencies.

C. Danny Hensley

Mr. Hensley graduated from Walnut Ridge High School in 1965. He then attended Southern Baptist College in College City, Arkansas, but did not obtain a degree. Mr. Hensely's jobs after high school included working in construction, working for Big Star Grocery and then working for Sterling Stores for approximately eleven years. He started out as a stocker, was promoted to assistant manager and then promoted to manager. He then left and went to work for Wal-Mart as assistant manager in a move to gain growth opportunity. He was subsequently promoted to manager with Wal-Mart. But he was transferred four different times and resigned so that he would not be transferred again. Mr. Hensley then worked for Motorola, where he was promoted to zone manager. He resigned due to downsizing of the company. Mr. Hensley was hired as an assistant manager at the store in Margate, Florida. He was then transferred to Texas where he helped close an old store and then was transferred to the Hulen store.

Prior to Mr. Rice's arrival as district manager, Mr. Hensley did not have an overall performance appraisal below "consistently meets expectations." In 1994, he was rated as "often exceeds expectations" by Mickey Flippin. In 1995, the year before Mr. Rice's arrival, Terry Bright evaluated Mr. Hensley as "often exceeds expectations," In February 1996, Mr. Hedlund rated Mr. Hensley overall as "consistently meets expectations" and noted that one of his strengths was "good customer service." After Mr. Rice's arrival, Mr. Hensley was written up three times in three months (October, November and December 1996). In February 1997, Mr. Hensley was given a "2" (improvement needed) for the first time in his career. He was then written up again in February 1997 by Troy Rice. He was forced to resign in April 1997.

In October 1996, Mr. Hensley was written up because a customer was injured, but the lift driver causing the accident wasn't counseled or drug tested and Loss Prevention was not notified. Mr. Hensley did not witness the accident, was not in the area at the time of the accident and was not approached by the customer at the time of the accident. The customer went to another assistant manager, Cathy Rogers, with the complaint. Ms. Rogers called Mr. Hensley to fill out the forms. Mr. Hensley was reprimanded for allegedly not following company policy regarding the accident, but the company policies do not contain any provision that would have required Mr. Hensley to be the one to notify Loss Prevention, counsel the employee or obtain drug testing. Mr. Hedlund, who wrote out the disciplinary action, doesn't even know what Mr. Hensley did with the forms that he filled out. Furthermore, Mr. Hedlund acknowledges that if Cathy Rogers took the complaint, she does have responsibility for the follow up. In fact, Mr. Bright, a store manager, testified that the person who initially took the information from the customer (Cathy Rogers) is the one responsible for getting the information to the claims department. Yet Mr. Hedlund doesn't even recall asking Cathy Rogers what her involvement was and Ms. Rogers was not written up for the incident.

On November 11, 1996, Mr. Hensley was written up for being out of stock on an item. At that time, Tommy Richards was the department manager in building materials. It is undisputed that Mr. Hensley had placed an order for the material and Mr. Richards had canceled it without notifying Mr. Hensley. Mr. Hedlund wrote Mr. Hensley up, but doesn't even recall if Mr. Hensley told him that the department manager had canceled his order. Mr. Hedlund doesn't even know how long it was between the time that Mr. Hensley ordered the product (as he was supposed to) and the time that the department manager canceled the order. On the same day, it was determined that the out of stocks in the Plumbing Department were extremely high, but the assistant manager for that department, Cathy Rogers, was not disciplined. Cathy Rogers was significantly younger than Mr. Hensley at the time.

On December 7, 1996, Mr. Hensley was written up for leaving a pallet of lumber in front of a fire door and blocking an aisle. Mr. Hedlund went so far as to take pictures of the pallet of lumber to put in Mr. Hensley's file. Mr. Hensley had closed the previous night with another assistant manager, Tammy Nagle. Mr. Hedlund admits that there was another assistant manager that night and that the last person who "walked" lumber was responsible for the situation, but that he doesn't recall who was supposed to have "walked" lumber and he doesn't recall even talking to the other assistant manager about the situation. Mr. Hensley testified that the lumber was on a roll cart and that it was not in front of an exit door or blocking the aisle at the time they closed. The reason that the product was left on a pallet is that the Receiving Department was full, and so the product was simply pulled to the back of the Lumber Department.

On, February 1997, Mr. Hensley was written up for two alleged customer incidents. The first one involves a complaint by a customer that Mr. Hensley would not let her in the store when it had closed at 9:00 p.m. Mr. Hedlund, however, acknowledges that the entrance doors are to be locked at closing time, that it is company policy that they

remain locked, and that assistant managers are expected to follow company policy. There is nothing in the company policy allowing for or instructing to open the doors to allow customers in after closing.

The second alleged complaint involves a situation where Mr. Rice was told by a customer that he wanted a price on a fan, that a "man" was just there and when he asked the man how much it cost, the man just said "I don't know" and walked off. The customer did not name Mr. Hensley. Mr. Rice assumed that the "man" was Mr. Hensley because the customer described the man's "height, hair color, eyeglasses, clothes he was wearing and the hearing aid." Upon closer examination, Mr. Rice's assumptions are incredibly weak. First of all, the customer told Mr. Rice that the "man" was about Mr. Rice's height. Mr. Rice is "probably five seven" while Mr. Hensley is six feet tall. R. Mr. Rice cannot say what the description of the clothes was, what color they were, or even what kind of glasses were described. Furthermore, Mr. Hensley generally wore an apron with a name tag while working, especially with the district manager in the store. The customer did not describe any type of apron or vest. Mr. Hensley was at the bank that day, away from the store during the time in question. Mr. Rice saw Mr. Hensley when he returned, but does not know when he left, how long he was gone or what time he returned. In fact, he didn't even ask Mr. Hensley these questions.

After Mr. Hensley was written up repeatedly within a short span of time, it became clear to him that Mr. Rice wanted him gone. He was miserable at the job, wondering every day what they would find to write him up for and what form the next harassment would take. Just going in to work every day was incredibly stressful. It was clear that they were looking for things to write him up and that he would be fired at any time. He had a family to support and the anxiety of not knowing day by day if he would be employed weighed heavily on him. The continual write ups destroyed his self esteem and his self confidence and it became extremely

difficult for him to make decisions and interact with other Home Depot employees. He felt forced to find a different job.

The Defendant filed a Motion for Summary Judgment with respect to all of the Plaintiffs' claims. The motion was considered by Magistrate William Sanderson, who prepared a written Report and Recommendation of United States Magistrate Judge (App. p. 6a ). The magistrate found against all Plaintiffs, except that he found that Steve Winslow was constructively discharged, but then found no *prima facie* evidence of discrimination. The district judge adopted the magistrate's findings, except that she found no constructive discharge of Mr. Winslow. (Order Accepting Findings, Conclusions and Recommendations of the United States Magistrate Judge, App. p. 5a). The Fifth Circuit Court of Appeals affirmed the district court (although the court of appeals found that there was sufficient evidence of Winslow's constructive discharge, the court also determined that Winslow failed to prove a *prima facie* case of discrimination) (opinion of the United States Court of Appeals for the Fifth Circuit, App. p. 1a).

## REASONS FOR GRANTING THE WRIT

### I. THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT HAS DETERMINED THAT THE MCDONNELL DOUGLAS BURDEN SHIFTING SCHEME AUTOMATICALLY APPLIES TO ADEA CLAIMS AND THAT ISSUE HAS NEVER BEEN RESOLVED BY THIS COURT.

In *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000), the Supreme Court states that "[t]his Court has not squarely addressed whether the *McDonnell Douglas* framework, developed to assess claims brought under §703(a)(1) of Title VII of the Civil Rights Act of 1964...also applies to ADEA actions. Because the parties do not dispute the issue, we shall assume, *arguendo*, that the *McDonnell Douglas* framework is fully applicable here." *Reeves*, at 142. There is no Supreme

Court case that establishes that the burden shifting scheme set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 663 (1973) is applicable to ADEA cases.

Additionally, in the Supreme Court case of *O'Connor v. Consolidated Coin Caterers Corp.* 517 U.S. 308, (1996), the Court recognizes that it has never determined that the application of the *McDonnell Douglas* scheme is correct. *Id.* at 1310. In *O'Connor*, the Court rejects the standard *McDonnell Douglas* notion that a complainant must have been replaced by someone outside his protected class, and modifies the element to require replacement by someone "substantially younger." *Id.* at 312-13.

The analysis set forth in *McDonnell Douglas* is a judicially created mechanism to evaluate discrimination claims, yet it creates a number of issues that allow employers to circumvent the intent of the statute to prohibit discrimination "because of [an] individual's age." 29 U.S.C. § 623 (a)(1). In the present case, the Defendant attempted to dispute the element of replacement by a substantially younger employee by alleging that Winlsow was "replaced" by an Assistant Manager that had already been employed as an Assistant Manager prior to Winslow's demotion. Since there are numerous Assistant Managers at each store that share duties, it is a way (particularly with limited discovery) for the Defendant to manipulate the evidence in reliance upon the *McDonnell Douglas* scheme.

Furthermore, by stating that the fourth "prong" of a prima facie age discrimination case includes a showing that a claimant "was otherwise discharged because of his age" (*Brown v. CSC Logic, Inc.* 82 F.3d 651, 654 (5th Cir. 1996), the courts have made it even more unwieldy and confusing to determine when to examine various types of evidence. For example, why shouldn't the court be able to examine evidence that the employer was lying about its reasons for the adverse action in determining whether an employee was "otherwise discharged because of his age?" If it is evidence of discrimination as the courts have held, then there is no

valid reason for refusing to consider such evidence and throwing out a legitimate claim because of an allegation of no "prima facie" case.

The automatic application of a formulaic burden shifting scheme is confusing to the courts. In this case, the evidence that younger employees in substantially similar situations were not reprimanded/terminated should have been assessed during the *prima face* determination as evidence that the employee was "otherwise discharged because of his age," yet this evidence was never addressed by the courts below.

In *McDonnell Douglas*, this Court stated that "specification of the above prima facie proof...is not necessarily applicable in every respect to differing factual situations." 411 U.S. at 802, n. 13. It does not seem that the Court intended to create a narrow formula that must be applied to all discrimination claims. Plaintiffs do not contend that they are not required to establish the elements of an age discrimination claim. Rather, we assert that it makes more sense in a summary judgment review to evaluate all direct and circumstantial evidence of discrimination in determining whether a claimant has established a *prima facie* case.

Thus, Plaintiffs assert that the automatic application of a formulaic burden shifting scheme is inapplicable and the inquiry at this stage should simply be whether a material fact issue is raised regarding whether Home Depot discriminated against Plaintiffs based upon age. The summary judgment evidence, including the overwhelming evidence of the pretextual nature of Home Depot's reasons for the adverse actions, establish such material fact issues.

## II. THE COURT OF APPEALS HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS IN REFUSING TO EVEN ACKNOWLEDGE THE PLAINTIFFS' EVIDENCE OF DISCRIMINATION, INCLUDING OVERWHELMING EVIDENCE OF PRETEXT, AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER.

The Fifth Circuit Court of Appeals affirmed the summary judgment against all Plaintiffs "essentially for the reasons articulated by the district court" (Fifth Circuit Opinion, App. p. 3a). The district court adopted the findings of the magistrate. The magistrate engaged in substantial weighing of facts in direct contradiction to this Courts' edict in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000). In fact, in a thirteen page opinion, the magistrate mentioned *Reeves* only in a footnote addressing why he was not factoring in an age-related remark and stated that "[t]he *Reeves* decision hardly evinces a sea change in employment discrimination law." (Report and Recommendation of United States Magistrate Judge, App. 16a – 17a, n. 4).

Additionally, even though the Plaintiffs presented direct evidence that younger employees were treated differently under substantially similar circumstances, the courts refused to consider such evidence in establishing the *prima facie* case.

The four elements of a *prima facie* case are: 1) plaintiff was discharged; 2) he was qualified for his position; 3) he was within the protected class; and 4) "he was replaced by someone outside the protected class, someone younger or was otherwise discharged because of his age." *Brown v. CSC Logic, Inc.* 82 F.3d 651, 654 (5th Cir. 1996). In *Brown*, the court specifically addresses element four and states that "[t]he elements of a basic *prima facie* case include the possibility that a plaintiff may not be able to show he or she was replaced by a younger employee. In such a case, the plaintiff may instead meet his burden by demonstrating that

he was otherwise discharged because of his age. " *Id.* at 654-55.

Each of the Plaintiffs in this case has established a *prima facie* case of discrimination. Each was discharged (Mr. Flippin was fired, Mr. Hensley and Mr. Winslow were constructively discharged as discussed below). Each was qualified for the position of assistant manaager (Home Depot does not dispute this aspect of the case). Additionally, each Plaintiff was clearly within the protected class (over 40). Mr. Flippin and Mr. Hensley were both replaced with younger workers. Home Depot alleges that Mr. Winslow was "replaced" by Stuart Lazarus. However, Mr. Lazarus was already employed by Home Depot as an assistant manager before Mr. Winlsow's demotion.

Additionally, there are at least substantial fact issues with regard to whether each Plaintiff was otherwise discharged because of age. The facts demonstrate a pattern of age discrimination in Troy Rice's district. Mr. Rice himself told Mr. Hensley that he was not getting his money's worth out of an "aged Ferrari" and younger employees were treated differently under substantially similar circumstances.

Following the *McDonnell Douglas* scheme, if Home Depot articulates a legitimate reason for its adverse conduct, the Plaintiffs must show that the reason is a pretext for discrimination. Plaintiffs have carefully set forth all of the facts in this brief which demonstrate pretext. In every instance, Plaintiffs have demonstrated (or at least raised a fact issue) that Home Depot's explanation is, as the Supreme Court stated in *Reeves*, "unworthy of credence."

With regard to the claim related to Mickey Flippin, Magistrate Sanderson made several findings in which he either ignored the evidence presented by Mr. Flippin's estate or weighed the evidence in favor of Home Depot. He found that "Flippen (sic) failed to properly verify the store safe...," that "Flippen, (sic) who was assigned the responsibility for closing the store left before store closing procedures were

completed," and that "Flippen (sic) left the store premises early to attend a family function." Appellant offered substantial summary judgment evidence directly controverting the validity of such findings, including evidence that the information contained in Mr. Rice's affidavit relied upon by Magistrate Sanderson is inaccurate.

Despite the fact that the Plaintiff demonstrated that Home Depot's summary judgment evidence in the form of Mr. Rice's affidavit is inaccurate and untrue, Magistrate Sanderson cited the affidavit as the evidence allegedly supporting his finding. Furthermore, Plaintiff offered evidence that Home Depot's reason for his reprimand was false. Not once was Plaintiff's evidence cited in Magistrate Sanderson's opinion.

With regard to Magistrate Sanderson's finding about the store not being ready for business, Plaintiff offered substantial summary judgment evidence contravening this finding and this evidence was never addressed by Magistrate Sanderson.

With regard to Magistrate Sanderson's finding about Mr. Flippin leaving the store to attend a function, Plaintiff offered substantial summary judgment evidence contravening this finding. Again, Magistrate Sanderson cited only to Home Depot's evidence and not to Plaintiff's controverting evidence (which is the evidence that must be taken as true for purposes of evaluating Home Depot's motion).

Additionally, Plaintiff presented direct evidence of discrimination. There is evidence that similarly situated employees were treated differently, providing direct evidence of discrimination, also never addressed by the magistrate. This direct evidence should have been considered in reviewing the fourth prong of the *prima facie* case. However, none of the reviewing courts considered this evidence.

Magistrate Sanderson further failed to address the substantial evidence of pretext offered by Steve Winslow and found that "the investigation nor the demotion [of Mr. Winslow] contain even a scintilla of evidence that they took place on account of Winslow's age." Again, Magistrate Sanderson cited only to Home Depot's evidence and not at all to any of Mr. Winslow's substantial evidence, including the evidence that Mr. Winslow was treated very differently by Mr. Rice than the younger assistant managers. Magistrate Sanderson simply dismisses Mr. Winslow's testimony and does not even address the compelling testimony of Mr. Winslow's manager, Terry Bright. All reasonable inferences from such evidence must be drawn in favor of the Plaintiff and the court cannot weigh the evidence in favor of Home Depot. It is clear that there are substantial fact issues to be presented to the jury.

## III. THE COURT OF APPEALS HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS IN REFUSING TO ACKNOWLEDGE AGE RELATED COMMENTS AS EVIDENCE OF DISCRIMINATION AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER.

Magistrate Sanderson refused to consider Mr. Rice's statement to Mr. Hensley that he was an "aged Ferrari" (offered as a criticism during his performance review) as evidence of age based animus. In a lengthy footnote, Magistrate Sanderson concludes that because Ferraris are not mass produced, and because they are "vintage" automobiles, "Rice was implying that he was a high-priced employee." (Report and Recommendation of United States Magistrate Judge, App. p. 16a - 18a, n. 4). However, there is NO evidence that Mr. Rice was implying that Mr. Hensley was a "high-priced employee" other than Magistrate Sanderson's conclusion after he made his Ferrari analysis. Furthermore, there was no evidence that Mr. Rice knew that Ferraris were not mass produced or considered them "vintage" automobiles. In *Russell v. McKinney Hosp. Venture*, 235 F.3d 219 (5th Cir. 2000), the court made it clear that "viewing

[age related] remarks that a jury could find to evidence animus through the harsh lens employed by the [Fifth Circuit prior to *Reeves*] is unacceptable." *Id.* at 226. What weight is to be given to Mr. Rice's age comment should be left to the jury. For summary judgment purposes, it is direct evidence of age discrimination.

## IV. THE COURT OF APPEALS HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS IN MISAPPLYING THE LAW REGARDING CONSTRUCTIVE DISCHARGE AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER.

The "discharge" requirement of an ADEA case can be satisfied if an employee's resignation can be considered the functional equivalent of a firing—a "constructive discharge". To show constructive discharge, an employee may establish that the employer made working conditions so intolerable that a reasonable employee would feel compelled to resign. *Barrow v. New Orleans S.S. Ass'n*, 10 F.3d 292, 297 (5th Cir. 1994).

With respect to Danny Hensley, Magistrate Sanderson found that he was not constructively discharged. However, the evidence clearly shows that Mr. Hensley was being subjected to repeated harassment. He was being written up for every possible infraction that the Defendant could dream up—at least once per month. The write up for the allegation by a customer that some unidentified man with a hearing aid was rude to him aptly demonstrates the hostile atmosphere toward Mr. Hensley. As reflected in the extensive facts provided, Mr. Rice was out to make Mr. Hensley's life miserable. Evidence that an employer created an uncomfortable and hostile work environment supports a claim of constructive discharge. *Glass v. Petro-Tex Chem. Corp.* , 757 F.2d 1554 (5th Cir. 1985). Mr. Hensley has easily raised a fact issue with respect to constructive discharge.

The cases relied upon by Magistrate Sanderson (and cited by Home Depot) regarding Mr. Hensley are easily distinguishable. In *Jenkins v, State of La. Dept. of Corrections*, 874 F.2d 992, 996 (5th Cir. 1989), the court was reviewing a religious discrimination case and basically determined that if, in fact, the plaintiff's version of events was true, there would have been a constructive discharge, but that the trial court chose to accept defendant's version of events that the plaintiff was disciplined for falsifying a medical excuse. In *Boze v. Branstetter*, 912 F.2d 801, 805 (5th Cir. 1990), the court simply found no constructive discharge based on one negative performance review. Neither of these circumstances are present in the facts before this Court, where Mr. Hensley was written up repeatedly and unjustly, given his worst performance review, called an "aged Ferrari," told he was not worth his salary, and was extremely anxious on a daily basis about what they were going to come up with to fire him. There is sufficient evidence to raise a fact issue on this matter and the Defendant's motion should be denied.

## CONCLUSION

For all of the reasons identified herein, a writ of certiorari should issue to resolve the issue of the standard of review to apply to age discrimination cases, to address the misapplication of the law below and, ultimately to reverse the order of the United States Court of Appeals for the Fifth Circuit, remand the case for trial and order the Defendant to pay the costs of appeal.

Respectfully submitted,

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Fort Worth, TX 76107
817-336-5533
Fax No. 817-336-9005

(Any footnotes trail end of each document)
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 01-10551
Summary Calendar

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DANNY HENSLEY; STEVE P. WINSLOW;
VIRGINIA FLIPPIN, on behalf of
The estate of Lucian Doyle Flippin,

Plaintiffs-Appellants,

Versus

HOME DEPOT, U.S.A., Inc.,

Defendant-Appellee.

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Appeal from the United States District Court
For the Northern District of Texas
USDC No. 3:98-CV-646-M

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Filed October 26, 2001

Before JOLLY, HIGGINBOTHAM and PARKER, Circuit Judges.

PER CURIAM:*

Plaintiffs Danny Hensley, Steve P. Winslow, and VirginiaFlippin, on behalf of the estate of her late husband, LucianDoyle (Mickey) Flippin, appeal the summary judgment dismissal oftheir claims under the Age Discrimination in Employment Act("ADEA"), 29 U.S.C. § 623(a), against Home Depot, U.S.A., Inc.("Home Depot"). The district court dismissed the claims ofHensley and Winslow, who resigned

their positions with HomeDepot, on the ground that they had failed to adduce evidence sufficient for a reasonable jury to find that they were constructively discharged. The district court dismissed Flippin's claim for failure to establish the existence of a genuine issue of material fact on which a jury could find that the legitimate, nondiscriminatory reason articulated by Home Depot for Flippin's discharge was a pretext for age discrimination.

The plaintiffs first contend that the district court improperly applied the evidentiary framework of McDonnell-Douglas v. Green, 411 U.S. 792 (1973), to this ADEA matter. Although Mconnell-Douglas was a racial discrimination case decided under Title VII of the Civil Rights Act of 1964, we have endorsed its burden-shifting approach as "an evidentiary procedure that allocates the burden of production and establishes an orderly presentation of proof." Bodenheimer v. P.P.G. Indus., Inc., 5 F.3d 955, 957 (5th Cir. 1993). It has long been a staple of our AREA jurisprudence. See Jackson v. Sears Roebuck & Co., 648 F.2d 225, 230 (5th Cir. Unit B June 1981) ("It is well settled that the analysis articulated in [McDonnell-Douglas] is applicable to ADEA cases."). We find no error in the district court's utilization of this useful and time-tested framework.

Turning to the district court's resolution-of the plaintiffs' claims, we perceive error only to the extent that the district court dismissed Winslow's claim based on a failure to make a showing of constructive discharge. Winslow made the requisite showing on this issue, albeit by a narrow margin. However, after a thorough review of the record and the briefs, we affirm the dismissal of Winslow's claim on the alternative ground noted by the district court, as Winslow failed to make a prima facie showing that his demotion was motivated by age discrimination. As to Hensley and Flippin, we affirm the judgment below essentially for the reasons articulated by the district court.

AFFIRMED.

Footnotes

* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

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| DANNY HENSLEY, et al., | § | |
| | § | |
| Plaintiffs, | § | |
| | § | |
| v. | § | Civil Action |
| | § | No. 3:98-0646-M |
| | § | |
| HOME DEPOT USA, INC. | § | |
| | § | |
| Defendant. | § | |

JUDGMENT

The Court has entered its Findings in the case, accepting the Findings and Conclusions of theMagistrate Judge. Therefore,

It is **ORDERED, ADJUDGED and DECREED** that all of Plaintiffs' claims areDISMISSED with prejudice.

It is further **ORDERED** that the Clerk shall transmit a true copy of this Judgment, togetherwith a true copy of the Order Accepting the Findings, Conclusions, and Recommendation of the United States Magistrate Judge, to the parties.

SIGNED this 26 day of March, 2001.

s/Barbara M.G. Lynn
BARBARA M..G. LYNN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

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| DANNY HENSLEY, et al., | § | |
| | § | |
| Plaintiffs, | § | |
| | § | |
| v. | § | Civil Action |
| | § | No. 3:98-0646-M |
| | § | |
| HOME DEPOT USA, INC. | § | |
| | § | |
| Defendant. | § | |

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ORDER ACCEPTING FINDINGS, CONCLUSIONS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

After making an independent review of the pleadings, files and records in this case, and the Findings, Conclusions and Recommendation of the United States Magistrate Judge, the Court finds that the Findings and Conclusions of the Magistrate Judge are correct and they are accepted as the Findings and Conclusions of the Court, with one exception. Based on *Brown v. Kinney Shoe Corp.*, 237 F. 3d 556 (5th Cir. Jan. 15, 2001), the Court concludes that Mr. Winslow was not constructively discharged, but rather resigned, and thus cannot sue under the ADEA. If he had been constructively discharged, the Court accepts the analysis and determinations of the Magistrate Judge.

IT IS, THEREFORE, ORDERED that the Findings, Conclusions and Recommendation of the United States Magistrate Judge are accepted, except as noted above.

**SO ORDERED** this 26, day of March, 2001.

s/Barbara M.G. Lynn
BARBARA M.G. LYNN
UNITED STATES DISTRICT JUDGE
NORTHERN DISTRICT OF TEXAS

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

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| STEVE WINSLOW, | § | |
| VIRGINIA FLIPPIN | § | |
| ON BEHALF OF THE ESTATE | § | |
| OF LUCIAN DOYLE FLIPPIN | § | |
| And DANNY HENSLEY | § | |
| | § | 3-98-CV-646-M |
| V. | § | |
| | § | |
| HOME DEPOT U.S.A., INC. | § | |

Filed Dec. 1, 2000

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Pursuant to the District Court's orders of reference, on October 17, 2000, came on to be heard Defendant's first and second motions for summary judgment filed on July 1, 1999, and August 13, 1999, respectively, and having considered the relevant pleadings, including the parties' summary judgment appendices and the statements and arguments of the attorneys for the parties, the magistrate judge makes the following findings, conclusions and recommendations

Summary judgment standards Summary judgment is proper when pleadings and the evidence on file, along with any affidavits, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law Rule 56(c), Federal Rules of Civil Procedure. The party moving for summary judgment bears the burden of producing evidence to establish that there is no genuine issue of material fact with regard to an essential element of the nonmovant's case. Anderson v. Liberty Lobby, Inc., 477 U S 242, 248, 106 S Ct 2505, 2510 (1986) Once the movant produces such evidence, the burden shifts to the nonmovant to produce evidence establishing each of the challenged elements of his case for which he will have the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106

S.Ct. 2548, 2552 (1986). To meet this burden the nonmovant must set forth specific facts which demonstrate that there is a genuine issue for trial. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-87, 106 S.Ct. 1348, 1355-56 (1986). If the nonmovant fails to meet its burden, summary judgment in favor of the movant is appropriate. Topalian v Ehrman, 954 F.2d 1125, 1132 (5th Cir) cert denied 506 U.S. 825, 113 S Ct 82 (1992).

The applicable law Each Plaintiff has sued Defendant for violations of the Age Discrimination in Employment Act (ADEA). Initially the parties join issue on whether the McDonnell Douglas[1] burden shifting scheme (the "prima facie" showing) is applicable to AREA actions. Plaintiffs note that on two occasions the Supreme Court declined to address this issue. In O'Connor v Consolidated Coin Caterers Corp, 517 U.S. 308, 311, 116 S Ct 1307, 1310 (1996), the Court observed that it had never had occasion to decide whether the McDonnell Douglas evidentiary framework applied to ADEA cases, but assumed that it did because the parties did not contest this issue. Similarly in Reeves v Sanderson Plumbing Products, Inc, _U S. __, 120 S Ct. 2097, 2105 (2000), the Court again applied the McDonnell Douglas framework to that AREA case, because neither party argued otherwise.

It hardly follows that the fact that the issue has not been decided by the Supreme Court warrants a finding that the McDonnell Douglas burden-shifting does not apply in ADEA cases. Conspicuous by its absence is any suggestion by Plaintiffs of an alternate scheme under which to analyze summary judgment motions in the context of ADEA cases.

Moreover, this court does not write on a "clean slate" – as it were – on this issue, being bound to apply the law of the Fifth Circuit. The Fifth Circuit has repeatedly applied the McDonnell Douglas analysis to ADEA cases, including the Reeves case, 197 F.3d 688, 691-92 (5th Cir. 1999), which was ultimately reversed by the Supreme Court on other grounds. See also e.g. Fields v J C Penney Co Inc., 968 F 2d 333, 536 (5th Cir. 1992) (rehearing denied September 21, 1992), Bienkowski v American Airlines, 851 F.2d 1503, 1504-05 (5th Cir

1988),1 indsev v Drive Corg , 987 F.2d 324, 326 (5" Cir 1993) (rehearing denied May 21, 1993).

The parties also join issue on the elements which an AREA plaintiff must demonstrate in establishing a prima facie case of discrimination. In O'Connor v Consolidated Coin Caterers Corp., supra, the Supreme Court addressed the McDonnell Douglas framework as applied by the Fourth Circuit in the context of an ADEA claim. The Fourth Circuit held that in order to establish a prima facie case of age discrimination, an ADEA plaintiff must show that following his discharge he was replaced by some one of comparable qualifications outside the protected class, i.e. a person under the age of 40 O'Connor v Consolidated Coin Caterers Corp., 56 F.3d 542, 546 (4'° Cir 1995)

In reversing the lower court, the Supreme Court held that replacement of an individual outside the protected class was not an element of an ADEA prima facie showing. 517 U S at 311-312 However, the Court did not hold that the age of a replacement employee was irrelevant. Specifically the Court stated

> "Because the ADEA prohibits discrimination on the basis of age ... the fact that a replacement is substantially younger than the plaintiff is a far more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone outside the protected class." (Emphasis added) Id. 517 U S at 313, 116 S.Ct at 1310

Defendant argues that this parting observation of the Supreme Court merely ameliorates the standard necessary to meet the requirements of the fourth element of the Fourth Circuit's ADEA standards and adopts a minimum standard describing the fourth element of the McDonnell Douglas rubric. The magistrate disagrees with this interpretation. This sentence, appearing in the Court's opinion, is essentially dicta and merely makes an observation on the relative weight of one indicium of discrimination.

There is a fourth element of a plaintiff's prima facie showing, but the Fifth Circuit standard is significantly more flexible and less mechanical than the discredited standard previously applied by the Fourth Circuit, to wit. that the plaintiff was either (1) replaced by someone outside the protected class, (2) was replaced by someone younger; or (3) otherwise discharged because of his age. See e.g Bodenheimerv PPG Industries, Inc., 5 F.3d 955, 957 (5`° Cir 1993) citing Fields v. J C Penney Co , 968E 2d 533, 536 (5th Cir. 1992).

The parties. Although each Plaintiff was a former employee of Defendant and each is represented by the same counsel, in addressing the merits of Defendant's motion for summary judgment the court looks to the competent evidence with respect to each Plaintiff's individual claims.

Lucian Doyle (Mickey) Flippin Mr. Flippin died not long after his termination as an employee of Defendant and his ADEA claims are being pursued by his widow on behalf of his estate.

In seeking summary judgment Defendant does not argue that Flippin has failed to meet his initial burden of establishing the elements of a prima facie case of age discrimination. See Fields v J. C Penney Co , supra, 968 F 2d at 536. Rather it joins issue at the next step in the McDonnell Douglas analysis, to wit that Defendant has proffered a legitimate, non-discriminatory reason for terminating Flippin. See e.g., Rhodes v. Guiberson Oil Tools, 75 F.3d 989, 992-993 (5th Cir. 1996).

In 1995 Flippin was demoted from the position of store manager to that of assistant store manager[2]. During the time period relevant to Flippin's ADEA claim he was under the supervision of store manager, Steve Hedlund, who in turn reported to Troy Rice, the district manager.

On September 8, 1996, Flippen failed to properly verify the store safe. As explained in the affidavit of Troy Rice (Defendant's Appendix (HD) 130, p.9) this was an important function to be performed and failure to accurately do so

violated Defendant's policy. Thereafter Mr Hedlund gave Flippen a written deficiency notice. (Id. at 91).

On September 23, 1996, Flippen, who was assigned the responsibility for closing the store, left before store closing procedures were completed This again contravened Defendant's policy. See Rice affidavit at HD 130, p.9. On the following day Steve Hedlund gave Flippen a written notice and advised him that it was a final warning with respect to company procedures (Id. 139).

On October 15, 1996, Flippen left the store premises early to attend a family function. Although Flippen apparently told another manager to "cover" for him, at the time Flippen left the store he was aware that the other manager had gone home sick. On October 16, 1996, he was again given a written notice based upon his failure to receive Hedlund's approval to change his working hours and in leaving the store, knowing that there was no one to "cover" for him. Id. 92. As a result of this third violation of company policy, Flippen was terminated on October 16, 1996, effective on October 27, 1996, based upon poor job performance Id. 142.

Defendant's summary judgment evidence clearly satisfies an employer's production burden of articulating a legitimate, nondiscriminatory reason for its action in terminating Flippen's employment In order to avoid the granting of summary judgment in Defendant's favor Flippen must in turn present evidence on which a fact finder could determine that the reasons advanced by Defendant are merely a pretext for age discrimination.

Undoubtedly the fact that Mickey Flippen, the alleged victim of age discrimination, is deceased and is therefore unavailable to present competent evidence tending to undermine Defendant's stated reasons for his termination places a heavy burden on his estate's ability to attack Defendant's position. However, this fact does not relieve the burden imposed under the McDonnell Douglas framework.

Although Flippen's counsel suggests that the stated reasons in the written performance memoranda may not accurately reflect the actual facts, no evidence is presented

which would support this supposition Likewise the testimony of his widow is devoid of any evidence that Mickey Flippen's termination was motivated by his age - 45 years - at the time of his termination. See HD at 78-78a, 81-82, 85-86.

The Estate of Lucian Doyle Flippen has failed to establish the existence of any genuine issue of fact on which a jury could find that Defendant terminated Mickey Flippen's employment based upon his age, and therefore summary judgment should be granted in Defendant's favor on the estate's age discrimination claim.

Steve Winslow. Unlike Mickey Flippen, Mr Winslow was not terminated by Defendant, but rather Winslow resigned from Defendant's employ in the summer of 1997. In light of his resignation Defendant argues that Winslow has no standing to sue under the ADEA. In turn Winslow argues that he was "constructively discharged" as a result of the course of action taken by Defendant.

In order to prove "constructive discharge" an aggrieved former employee must show that the employer made his working conditions so intolerable that a reasonable employee would feel compelled to resign McKethan v Texas Farm: Bureau, 996 F .2d 734, 740-41 (5th Cir.), rehearing denied 3 F.3d 441 (5th Cir. 1993) cert. denied 510 U.S. 1046, 114 S.Ct. 694 (1994). In Barrow v. New Orleans S.S. Ass'n, 10 F.3d 292, 297 (5th Cir. 1994), the court noted seven factors which inform the question of whether an employer's leaving was reasonable, and further observed that none was determinative and that such a determination depends upon the facts in each case. By example, demotion of an employee standing alone is insufficient to establish a constructive discharge. Jurgens - v EEOC, 903 F.2d 386, 391 (5th Cir. 1990).

The evidence with respect to Winslow's employment reflects that in 1996 - at the age of 43 -he was employed as an assistant manager in the outside garden department. Prior to that time he had - become a Master Certified Nursery Professional and was then pursuing a master's degree in landscape architecture. On November 12, 1996, he was

demoted to a sales associate position and re-assignedto a different store in the plumbing department.

Winslow presented evidence that at the time of his demotion the district manager, Troy Rice,told him that they would come up with a "game plan" for his future with the company. Winslow further related that he made numerous attempts to contact Rice to discuss his future, but without success. Ultimately in conversations with his store manager, he was informed that there was no "game plan", after which he resigned to accept new employment some 8 to 10 months after his demotion.

Although the issue is a close one, I am of the opinion that a reasonable jury could find, based upon the above, that Winslow was constructively discharged, particularly where Defendant's management was well aware of his educational and employment background in horticulture, but upon his demotion transferred him to an entirely different department for which he had no background or training, coupled with the fact that although his future with the company was to be revisited, Defendant's management never carried through.

Having determined that Defendant's standing argument is unavailing, the magistrate judge next considers Winslow's claims under the McDonnell Douglas framework. In light of the foregoing, Winslow has established the first three elements of a prima facie showing.

With regard to the fourth element Winslow was either replaced by Stuart Lazarus, six years Winslow's senior (HD 129, 132, 127, 95) or his position was never filled. See Plaintiffs' brief filed on June 16, 2000, at page 11. Under either alternative, in order to satisfy the fourth element Winslow must show that he was "otherwise discharged" because of his age.

Winslow was informed of his demotion on November 12, 1996, and was advised that his management style was deficient based upon complaints made by subordinates The record reflects at least two complaints, which were made with regard to his treatment of subordinates. See HD 147 and 148. As follow-ups to these complaints, made by persons

identified only by discrete numbers, Terri Evert and Tammy Eskew spoke with several sales associates at Winslow's store, who reported similar incidents involving him. Id. 127-127a.

In his portion of Plaintiffs' response Winslow claims that he did not threaten, berate or abuse any co-employees (Plaintiffs' response filed on June 16, 2000), thus suggesting that the complaints and the investigation were either false or exaggerated. However, it must be remembered that a federal court has no jurisdiction to address or second-guess every bad business decision relating to employment Thornbrough v Columbus & Greenville R. Co . 760 F 2d 633, 647 (5'° Cir. 1985) "The ADEA cannot protect older employees from erroneous or even arbitrary personnel decisions, but only from decisions which are unlawfully motivated." Bienkowski v American Airlines, Inc, 851 F 2d 1503, 1508 (5`° Cir. 198) (Emphasis added).

Thus, although the investigation with respect to Winslow's management techniques may have been incomplete, inadequate, or even inaccurate, the fact remains that neither the complaints, the investigation nor the demotion contain even a scintilla of evidence that they took place on account of Winslow's age. Therefore, Winslow has failed to make a prima facie showing that his demotion was motivated by his age, and Defendant is entitled to summary judgment on his ADEA clam.

Danny Hensley. Like Steve Winslow, Mr. Hensley resigned his employment with Defendant and issue is joined on whether there is a genuine issue of fact as to whether he was "constructively discharged."

Hensley was an assistant manager over the lumber department at the store managed by Steve Hedlund. From 1994 through February 1996 Hensley received performance ratings of either"consistently meets expectations" or "often exceeds expectations" In August 1996 Troy Rice became district manager over the store where Hensley worked

Between October 28, 1996 and December 7, 1996, Hedlund gave three written notices to Hensley regarding performance deficiencies[3]. (See Plaintiffs' Appendix at 271,

273 and 275). Neither the written reports of these incidents, nor any other summary judgment evidence reflects that any adverse action was taken against Hensley based upon these reported deficiencies.

On February 7, 1997, Troy Rice met with Hensley to make a regular review of Hensley's performance. See Plaintiff's Appendix at 277-280. As reflected in the written report, a number of areas for improvement were noted, and in most individual categories Hensley received a "2" and he was given an overall rating of "2" signifying "Improvement needed. Meets some, but does not consistently meet all job expectations." Nothing related in the performance evaluation hints of any age animus on the part of Mr. Rice[4].

On February 26, 1997, Rice gave a written performance deficiency notice based upon two incidents of customer complaints. See HD 143 and Plaintiffs' Appendix at 282. Hensley denied any involvement in either instance. Following this incident report Hensley continued to be employed in his position of assistant store manager until his resignation on April 12, 1997.

In order to demonstrate that his resignation was not an independent intervening event, cutting off his right to pursue his ADEA claim against Defendant[5] Hensley must show that a reasonable jury could find that he was "constructively discharged", to wit that a genuine issue of fact is presented. In determining whether a colorable basis for a "constructive discharge" exists with respect to Hensley, the court applies the same law discussed with respect to Steve Winslow's claim. Under the summary judgment evidence before the court it is readily apparent that the only arguable Barrow factor present in Hensley's case is alleged badgering or harassment by the employer to encourage the employee's resignation.

In assessing this factor there must be sufficient evidence from which a jury could conclude that Hensley's working conditions were so intolerable that a reasonable employee would be compelled to resign[6]. Hensley cannot make this showing.

Although it does not appear in the summary judgment that Hensley ever received a written performance deficiency notice prior to October 28, 1996, four deficiency reports within the last five months ofhis employment with Defendant hardly sufffice to establish a persistent pattern of badgering and harassment, particularly where no action of any kind was taken against him arid where the author of three of the incident reports was the same manager who in 1996 twice rated him favorably in performance evaluations. It is equally noteworthy that the Fifth Circuit has refused to find constructive discharge based upon reprimands, See Jenkins v State of Louisiana Department of Corrections, 874 F.2d 992, 996 (5" Cir. 1989) 493 U S 1059, 110 S CT, 871 (1990), or based upon a poor performance evaluation and placing an employee on probation, See Boze v Branstetter. 912 F.2d 801, 805 (5`" Cir. 1990). It is likewise relevant that although Troy Rice wrote him up on February 26, 1997, for complaints which Hensley disputed, on March 15, 1997, as a follow-up to his February 7, 1997, performance review which noted areas for improvement, Rice wrote that Hensley was meeting the goals by being "consistent in stock", and "leading by example" (Plaintiffs' Appendix at 281).

Although Hensley may have subjectively believed that he was unlikely to advance while Mr. Rice was his district manager, which may in turn have influenced his decision to resign, nothing in the conduct of Mr. Rice or Mr. Hedlund was of such character that a reasonable jury could find that Hensley was compelled to leave Defendant's employ. Therefore Defendant's motion for summary judgment against him should be granted

RECOMMENDATION

For the foregoing reasons it is recommended that the District Court enter its order granting Defendant's motion for summary judgment against Steve Winslow, the Estate of Lucian Doyle Flippin and Danny Hensley and that judgment be entered disnussing Plaintiffs' ADEA claims against Defendant with prejudice.

A copy of this recommendation shall be transmitted to counsel for the parties.

s/Wm. F. Sanderson, Jr.
UNITED STATES MAGISTRATE JUDGE

NOTICE

In the event that you wish to object to this recommendation, you are hereby notified that you must file your written objections within ten days after being served with a copy of this recommendation. Pursuant To Douglass v United Serv. Auto Assn 79 F.3d 1415 (5th Cir. 1996) (en banc) a party's failureto file written objections to these proposed findings of fact and conclusions of law within such ten day period may bar a de novo determination by the district judge of any finding of fact or conclusion of law and shall bar such party, except upon grounds of plain error, from attacking on appeal the unobjected to proposed findings of fact and conclusions of law accepted by the district court in implementation thereof, the subject cause has been referred to the United States magistrate judge.

Footnotes

[1] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S. Ct. 1817, 1824 (1973).

[2] Flippin was demoted for three consecutive unacceptable inventories

[3] Prior to the October 28, 1996, notice Hedlund gave Hensley an annual review rating of "consistently meets expectations" on February 19, 1996 (Plaintiffs' Appendix at 256-268) and a mid-year review rating of "solid performance. Meets most job expectations" on August 29, 1996 (Plaintiffs' Appendix at 269-70).

[4] In his deposition given on November 13, 1998 (Plaintiffs' Appendix, Exhibit 5 at 174) Hensley related that in the course of Rice's performance evaluation conducted some 21 months earlier, Rice referred to him as an aged Ferrari and

that he was paying for an aged Ferrari and was not getting it (HD 50-52, Plaintiffs' Appendix 173).

Relying on the Supreme Court's decision in Reeves v. Sanderson Plumbing Products, Inc., ___ U.S. ___, 120 S. Ct. 2097 (2000), Hensley suggests that this remark is some evidence of an age bias held by Rice towards him. The Reeves decision hardly evinces a sea change in employment discrimination law. Indeed, a subsequent opinion of the Fifth Circuit has opined that the panel opinion in Reeves, 197 F.3d 688 (5th Cir. 1999), simply failed to apply the pre-existing law of this circuit. See Vadie v. Mississippi State University, 218 F.3d 365, 373 at n. 23 (5th Cir. 2000) rehearing and suggestion for rehearing en banc denied, ___ F.3d ___ (August 21, 2000), pet. for cert. Filed November 17, 2000 (No. 00-806).

In Reeves evidence was presented that the plaintiff's immediate supervisor told him that he "was so old [he] must have come over on the Mayflower" and that he "was too damn old to do [his] job" 120 S. Ct. at 2110. Further, although the defendant controverted Reeves's evidence that the supervisor was responsible for his termination it was uncontroverted that the supervisor was the spouse of the defendant's president, whom defendant claimed was the person that fired Reeves. Id. At 2111.

In reversing the Fifth Circuit's panel opinion, the Supreme Court upheld the district court's ruling allowing the jury to consider this evidence and reinstated the jury's verdict in Reeves's favor. However, the Court did not disturb this circuit's law that "stray remarks" are insufficient to demonstrate an employer's alleged discriminatory intent. See Gurbie v Tifco Industries, 941 F.2d 374, 378-79 (5th Cir. 1991) cert. denied 503 U.S. 908, 112 S. Ct. 1267 (1992).

Moreover, no reasonable jury could find that the statement attributed to Rice evidenced age bias on his part. Rice did not refer to Hensley merely as an old car, but as an "aged Ferrari". The Ferrari automobile does not manufacture cars on a mass production basis. Rather, the company produces only a limited number of passenger vehicles per year, involving a great amount of handcrafting. As a result of the limited production, a new Ferrari commands a sales price

several times greater than even mass-produced luxury vehicles. Further, unlike mass-produced vehicles, because of their limited number and status as vintage automobiles, the prices paid for older Ferraris are several times greater than the original sales prices. Thus in referring to Hensley as an "aged Ferrari", Rice was implying that he was a high-priced employee. Further, he also opined that Defendant was not receiving commensurate value in observing that Defendant was paying for and aged Ferrari and not getting it. In context this is wholly consistent with the fact that on the same occasion Rice evaluated Hensley's Performance as needing improvement.

Finally, it is noteworthy that while the plaintiff in Reeves was involuntarily terminated, Hensley continued to work for Defendant for an additional two months after this evaluation before tendering his resignation.

[5] Alternatively, in order to satisfy the first element of a prima facie showing of age discrimination Hensley must show that he was discharged or suffered some other actionable adverse action with respect to this employment. Fields v. J.C. Penney, Co., supra, 968 F.2d at 536; See also Marrern v. Eastman Kodak Co., 104 F.3d 702, 707 (5th Cir. 1997), cert. denied 522 U.S. 932, 118 S. Ct. 336 (1997).

[6] This test is objective. The question is not whether Hensley felt compelled to resign, but whether a reasonable employee would have felt so compelled. Guthrie v. J.C. Penney Co., Inc., 803 F.2d 202, 207 (5th Cir. 1986).